

1994 CASE DIGEST INDEX VOLUME 30

Editor's Note: The cases in the Index have been classified to conform to the Criminal Law Digest (third edition).

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PART I—STATE CRIMES

1. VALIDITY OF CRIMINAL STATUTES IN GENERAL

§ 1.05 Statute held void for vagueness

Ohio Ordinance prohibiting loitering in manner and circumstance manifesting purpose to engage in drug-related activity violated due process. *Akron v. Rowland*, 618 N.E.2d 138 (1993), 30 CLB 482.

3. NATURE AND ELEMENTS OF SPECIFIC CRIMES

§ 3.200 Manslaughter

§ 3.210 —Malice, premeditation

Arkansas Evidence was insufficient to show that defendant took action with purpose of promoting commission of crime. *Fight v. State*, 863 S.W.2d 800 (1993), 30 CLB 481.

§ 3.250 Felony murder

Georgia Evidence was sufficient to sustain conviction of felony murder based on criminal damage to property. *Waugh v. State*, 437 S.E.2d 297 (1993), 30 CLB 485.

§ 3.330 Obstruction of justice

Washington Threat against judge need not be made with intent or knowledge that it will reach judge to constitute crime of intimidation of judge. *State v. Hansen*, 862 P.2d 117 (1993), 30 CLB 483.

§ 3.375 Robbery

Indiana To satisfy the requirement for a felony robbery that property be taken from the person or presence of a property is taken from the personal protection of the victim. *Paul v. State*, 612 N.E.2d 1060 (1993), 30 CLB 96.

4. CAPACITY

§ 4.00 Alcoholism and drug addiction

North Carolina A finding of voluntary intoxication would not prevent a determination that the defendant acted in concert with a codefendant. *State v. Harvell*, 432 S.E.2d 125 (1993), 30 CLB 286.

§ 4.07 Diminished capacity

New Jersey Psychiatrist's testimony that defendant had borderline personality disorder and was unable to formulate intent was sufficient to require a jury instruction on the defense of diminished capacity. *State v. Galloway*, 628 A.2d 735 (1993), 30 CLB 195.

§ 4.10 Insanity—substantive tests

Mississippi Mental illness, in and of itself, did not constitute legal insanity sufficient to support murder defendant's claim that he was insane at the time of the killing. *Tyler v. State*, 618 So. 2d 1306 (1993), 30 CLB 284.

North Carolina Exclusion of expert testimony concerning defendant's mental capacity during trial for first-degree murder and assault with a deadly weapon with intent to kill was prejudicial. *State v. Daniel*, 429 S.E.2d 724 (1993), 30 CLB 98.

6. DEFENSES

§ 6.15 Collateral estoppel

Kansas Department of Revenue was collaterally estopped from collecting further drug tax by plea agreement in criminal prosecution. *Dickerson v. Kansas Dep't of Revenue*, 863 P.2d 364 (1993), 30 CLB 385.

§ 6.20 Entrapment

Mississippi Defendant was not entrapped into purchase of cocaine. *Hopson v. State*, 625 So. 2d 395 (1993), 30 CLB 388.

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§ 6.55 Self-defense

Wisconsin "Imperfect self-defense manslaughter" requires a threshold showing that defendant had a reasonable belief that he

was preventing or terminating an unlawful interference with his person. *State v. Camacho*, 501 N.W.2d 380 (1993), 30 CLB 187.

PART II—STATE CRIMINAL PROCEDURES, ANCILLARY PROCEEDINGS

8. PRELIMINARY PROCEEDINGS

§ 8.35 Pretrial proceedings

Michigan Proper bind-over requires showing of probable cause by prosecution in preliminary examination. *People v. Hunt*, 501 N.W.2d 151 (1993), 30 CLB 185.

11. DISCOVERY

§ 11.35 Sanctions for discovery violations

Maine Trial court's decision not to impose sanctions for discovery violations by prosecution was not an abuse of discretion, absent a showing that there was any prejudice rising to the level of deprivation of a fair trial. *State v. Leavitt*, 625 A.2d 302 (1993), 30 CLB 97.

12. GUILTY PLEAS

§ 12.85 Guilty plea as waiver of prior defects

Tennessee Defendant waived any defect in proceedings by pleading guilty. *Wallen v. State*, 863 S.W.2d 34 (1993), 30 CLB 390.

13. EVIDENCE

ADMISSIBILITY AND WITNESSES

§ 13.35 Chain of possession

Georgia Videotape evidence was properly identified without proof of chain of custody. *Gadson v. State*, 437 S.E.2d (1993), 30 CLB 486.

§ 13.50 Proof of other crimes

Wisconsin Prior conviction was properly admitted on issue of identity. *State v. Speer*, 501 N.W.2d 429 (1993), 30 CLB 187.

§ 13.55 Proof of other bad acts

Florida Similar fact evidence of defendant's prior sexual assaults on other women was admissible to rebut the defendant's defense that the victim had consensual sex with him. *Williams v. State*, 621 So. 2d 413 (1993), 30 CLB 283.

Indiana Evidence of an earlier, uncharged offense was admissible on the issue of defendant's state of mind and intent. *Harris v. State*, 617 N.E.2d 912 (1993), 30 CLB 283.

Louisiana Evidence of prior acts was admissible only to show certain elements of crime and where not too remote in time. *State v. Jackson*, 625 So. 2d 146 (1993), 30 CLB 390.

Michigan Evidence of prior acts is admissible to show defendant's intent. *People v. Vandervliet*, 508 N.W.2d 114 (1993), 30 CLB 483.

New Hampshire Admission of evidence of defendant's prior bad acts, which did not have bearing on issue in dispute, was clearly untenable and unreasonable. *State v. Blackey*, 623 A.2d 1331 (1993), 30 CLB 94.

§ 13.70 Circumstantial evidence

Arkansas Circumstantial evidence sufficient to support conviction. *Missildine v. State*, 863 S.W.2d 813 (1993), 30 CLB 479.

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§ 13.115 Identification evidence

Rhode Island Out-of-court photographic identification procedure used by police department was not susceptible of suggestive misidentification. *State v. Martinez*, 624 A.2d 291 (1993), 30 CLB 97.

South Carolina Although the defendant accused of driving under the influence was not physically identified in court as the offender, the evidence was sufficient to support her conviction. *State v. Dyer*, 431 S.E.2d 576 (1993), 30 CLB 285.

Wyoming Pretrial identification procedures were not suggestive. *Taul v. State*, 862 P.2d 649 (1993), 30 CLB 388.

§ 13.120 —Courtroom Identification

Arkansas Testimony of medical personnel was admissible as evidence. *Cavin v. State*, 855 S.W.2d 285 (1993), 30 CLB 190.

§ 13.125 —Testimony of prior identification

New York Prosecution did not establish lack of present recollection as basis for complainant's failure to identify defendant at trial and, therefore, a proper foundation was not laid for the admission of third-party identification testimony. *People v. Quevas*, 595 N.Y.S.2d 721 (1993), 30 CLB 98.

§ 13.140 —Lie detector test

Virginia Pretrial production of accomplices' polygraph test not required, because defendant failed to prove constitutional materiality. *Ramdass v. Commonwealth*, 437 S.E.2d 566 (1993), 30 CLB 487.

§ 13.151 —DNA printing tests

Louisiana The burden of proving the admissibility of DNA evidence is on the party moving to introduce such evidence. *State v. Charles*, 617 So. 2d 895 (1993), 30 CLB 95.

§ 13.170 Privileged communications

New Hampshire Trial court was required to conduct in camera review of private psychologist's privileged records in child sexual assault case if defendant established probability of presence of exculpatory information. *State v. Cressey*, 628 A.2d 704 (1993), 30 CLB 194.

§ 13.195 Expert witnesses

New Mexico Admission of testimony where psychologist commented directly and indirectly on credibility of complainant was plain error and was not harmless. *State v. Lucero*, 863 P.2d 1071 (1993), 30 CLB 386.

South Dakota Expert testimony comparing victim's traits with those of abused child was admissible. *State v. Koepsell*, 508 N.W.2d 591 (S.D. 1993), 30 CLB 487.

§ 13.230 Cross-examination—right to use witness's prior statements

§ 13.265—Impeachment for bias or motive

Virginia Defendant had right to confront witness who testified that defendant had confessed to crime. *Brown v. Commonwealth*, 437 S.E.2d 563 (1993), 30 CLB 486.

§ 13.270 —Impeachment as to mental condition

Missouri Evidence supported finding of involuntary manslaughter in operating motor vehicle while intoxicated. *State v. Meanor*, 863 S.W.2d 884 (1993), 30 CLB 480.

North Dakota Results of blood alcohol test were properly admitted. *State v. Jordheim*, 508 N.W.2d 878 (1993), 30 CLB 488.

§ 13.315 Hearsay evidence

Nebraska Trial court did not err in excluding hearsay testimony where defendant failed to show proper purpose of admitting such testimony. *State v. Navrkal*, 496 N.W.2d 532 (1993), 30 CLB 193.

West Virginia Magistrate had discretion to allow hearsay evidence at a preliminary hearing in sexual abuse case. *Peyatt v. Kopp*, 428 S.E.2d 535 (1993), 30 CLB 96.

§ 13.341 —Prior consistent statements as substantive evidence

Florida Statements to medical personnel by child abuse victims were not admissible under medical diagnosis and treatment exception to hearsay but were controlled by special exception for child's out-of-court statements of abuse. *State v. Jones*, 625 So. 2d 821 (1993), 30 CLB 389.

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Nebraska Child's statements to investigating officer were not hearsay. *State v. Tlamka*, 508 N.W.2d 846 (1993), 30 CLB 488.

§ 13.345—Business records exception

Maryland Exception to hearsay rule that permitted the prosecution to introduce an affidavit of a bank to establish the status of an account did not violate defendant's confrontation rights. *Chapman v. State*, 628 A.2d 676 (1993), 30 CLB 195.

§ 13.360 —Declarations of Co-conspirators

Tennessee Co-conspirator's statements were admissible upon proof of conspiracy by preponderance of evidence. *State v. Stamper*, 863 S.W.2d 404 (1993), 30 CLB 391.

WEIGHT AND SUFFICIENCY

§ 13.420 Requirement of corroboration—accomplice testimony

§ 13.425 —Sex crimes

Florida Sex offender profile testimony was not admissible since it was novel scientific evidence under *Frye*. *Flanagan v. State*, 625 So. 2d 827 (1993), 30 CLB 389.

14. TRIAL

§ 14.00 Trial

§ 14.10 Qualifications of trial judge

§ 14.15 —Disqualification of trial judge

Georgia Trial court did not err in its denial of defendant's motion that the trial judge be recused for bias and did not err by not referring the motion to another judge. *Hill v. State*, 427 S.E.2d 770 (1993), 30 CLB 99.

§ 14.20 Qualifications of prosecutor

§ 14.25 —Disqualification of prosecutor

South Carolina Fact that prosecutor advised police did not disqualify him from prosecuting case. *State v. Hunter*, 437 S.E.2d 41 (1993), 30 CLB 485.

§ 14.30 Defendant's right to continuance

Arkansas There was no abuse of discretion in denial of juvenile defendant's motion for

continuance to raise funds for intelligence testing. *Oliver v. State*, 851 S.W.2d 415 (1993), 30 CLB 191.

§ 14.70 Right to waive jury trial

North Dakota Defendant's waiver of right to jury must be in writing or in open court, not inferred from circumstances of case. *State v. Gates*, 496 N.W.2d 553 (1993), 30 CLB 194.

§ 14.150 Conduct of prosecutor

§ 14.170 —Comment on defendant's failure to testify

New York Prosecutor's reference during summation to defendant's failure to testify was not prejudicial when followed by a curative instruction. *People v. Halm*, 595 N.Y.S.2d 380 (1993), 30 CLB 95.

§ 14.175 —Comment on defendant's silence while in custody

Arkansas Police officer's statements at trial were not violation of defendant's right to remain silent. *Tarkington v. State*, 855 S.W.2d 306 (Ark. 1993), 30 CLB 190.

15. JURY

SELECTION

§ 15.25 Conduct of voir dire

§ 15.35 —Peremptory challenges

§ 15.36 —Challenges for cause

Mississippi Trial court did not abuse its discretion by excusing for cause three life-long acquaintances of defendant from the jury. *Coverson v. State*, 617 So. 2d 642 (1993), 30 CLB 99.

INSTRUCTIONS

§ 15.80 Burden of proof

Minnesota Standard instruction as to mental illness could be given without specific instruction as to burden of proving mental illness. *State v. Jolley*, 508 N.W.2d 770 (1993), 30 CLB 484.

§ 15.155 Lesser included offenses

Nebraska Delivery of imitation controlled substance was not lesser included offense of

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delivery of controlled substance. *State v. Mitchell*, 508 N.W.2d 552 (1993), 30 CLB 484.

DELIBERATION

§ 15.240 Failure to keep jury sequestered

New York Defendant failed to sustain burden of proof that permitting certain jurors to attend church during deliberations phase violate statute requiring that jury be kept together and under supervision. *People v. Fernandez*, 599 N.Y.S.2d 911 (1993), 30 CLB 281.

16. POSTTRIAL MOTIONS

§ 16.00 Motion for new trial

§ 16.05 —Newly discovered evidence

Massachusetts Newly discovered evidence of possible fabrication of information in affidavit supporting search warrant was not sufficient basis for a new trial. *Commonwealth v. Ramirez*, 617 N.E.2d 983 (1993), 30 CLB 286.

Pennsylvania Documents returned by the state and unwittingly placed into a defendant's possession after a tax audit that are not discovered prior to trial are after-discovered evidence. *Commonwealth v. Boyle*, 625 A.2d 616 (1993), 30 CLB 96.

North Dakota Newly discovered evidence must be material to warrant new trial. *Stoppeworth v. State*, 501 N.W.2d 325 (1993), 30 CLB 186.

§ 16.15 Motion to vacate conviction

New York Defendant, seeking dismissal of indictment because of prosecution's failure to produce a witness at trial, was required to establish that a reasonable probability existed that the witness's testimony would have resulted in a different outcome. *People v. Lesiuk*, 600 N.Y.S.2d 931 (1993), 30 CLB 282.

17. SENTENCING AND PUNISHMENT

SENTENCING

§ 17.06 Right of defendant to represent himself

Utah New trial was appropriate where court failed to advise defendant of dangers of self-

representation. *State v. Bakalov*, 862 P.2d 1354 (1993), 30 CLB 480.

§ 17.40 Standards for imposing sentence

Arkansas Enhanced sentencing provision in effect on date of crime was applicable, not subsequently reduced provision. *State v. Townsend*, 863 S.W.2d 288 (1993), 30 CLB 391.

Florida Upward departure from sentencing guidelines cannot be based on collateral conduct that could have, but has not yet, resulted in criminal conviction. *State v. Varner*, 616 So. 2d 988 (1993), 30 CLB 98.

Massachusetts There was no presumption of vindictiveness in posttrial sentencing where judge's statements to defense counsel were consistent with an appropriate promise of leniency if defendant had pleaded guilty. *Commonwealth v. Ravenell*, 612 N.E.2d 1142 (1993), 30 CLB 94.

PUNISHMENT

§ 17.01 Imposition of restitution

New York Sentencing court acted properly in requiring defendant convicted of burglary to make restitution to the county for costs that resulted from injuries caused by defendant to a police officer. *People v. Cruz*, 599 N.Y.S.2d 533 (1993), 30 CLB 281.

§ 17.140 Multiple sentences—right to attack prior conviction

§ 17.145 —Enhancement

Nevada Imposition of enhanced sentence without formal notice in charging document was improper. *Lewis v. State*, 862 P.2d 1194 (1993), 30 CLB 481.

§ 17.155 —Validity of prior conviction

Nebraska Prior conviction resulting from guilty pleas obtained in violation of defendant's right to counsel cannot be used to enhance sentence of subsequent conviction. *State v. Reimers*, 496 N.W.2d 518 (1993), 30 CLB 192.

18. APPEAL AND ERROR

§ 18.00 Right to appeal

Arkansas Statute of limitations is not subject to waiver in criminal case, but court did not

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have authority to hear appeal from guilty plea. *Eckl v. State*, 851 S.W.2d 428 (1992), 30 CLB 188.

§ 18.55 Right to control scope of appeal

Arkansas Defendant was not permitted to supplement counsel's brief absent showing that brief was deficient or to proceed pro se absent declaration of understanding of right to counsel. *Gidron v. State*, 850 S.W.2d 331 (1993), 30 CLB 189.

§ 18.65 —Failure to file timely notice of appeal

Montana Defendant's notice of appeal was premature where made prior to sentencing and final judgment. *State v. Todd*, 863 P.2d 423 (1993), 30 CLB 385.

§ 18.90 Scope of appellate review

§ 18.105 —Power to modify judgment

Kansas Motion to arrest judgment must be filed within ten days of verdict. *State v. Sims*, 862 P.2d 359 (1993), 30 CLB 482.

19. PROBATION, PAROLE, AND PARDON

PROBATION

§ 19.00 Conditions for probation

Florida Special condition of probation that required defendant to refrain from the use

of alcohol was invalid. *Biller v. State*, 618 So. 2d 734 (1993), 30 CLB 284.

§ 19.10 Revocation of probation

§ 19.30 —Procedure

South Carolina Issuance of citation and affidavit in lieu of warrant was sufficient to allow for revocation of probation. *State v. Felder*, 437 S.E.2d 43 (1993), 30 CLB 485.

Tennessee Probation could not be revoked based on laboratory test indicating defendant had used marijuana absent a finding that test was reliable. *State v. Wade*, 863 S.E.2d 406 (1993), 30 CLB 481.

20. PRISONER PROCEEDINGS

§ 20.45 Post-conviction relief

Missouri Denial of postconviction relief was not proper, since motion court failed to comply with rules that findings of fact and conclusions of law must be issued. *Barry v. State*, 850 S.W.2d 348 (1993) (en banc), 30 CLB 189.

Nebraska No postconviction relief where appeal was moot. *State v. Eutzy*, 496 N.W.2d 529 (1993), 30 CLB 193.

Defendant could not base appeal of postconviction relief on claim of ineffectiveness of counsel. *State v. Stewart*, 496 N.W.2d 524 (1993), 30 CLB 192.

PART III—FEDERAL CRIMES

24. NATURE AND ELEMENTS OF SPECIFIC CRIMES

§ 24.15 Bank-related crimes generally

U.S. Supreme Court Current reporting requirement required "willfull violation." *Ratzlaf v. United States*, 114 S. Ct. 655 (1994), 30 CLB 381.

Court of Appeals, 5th Cir. Transportation of proceeds of drug sale did not constitute

"financial transaction" under money laundering statute. *United States v. Puig-Infante*, 19 F.3d 929 (1994), 30 CLB 478.

Unenforceability of defendant bank chairman's oral agreement was irrelevant to charges of bank fraud. *United States v. Henderson*, 19 F.3d 917 (1994), 30 CLB 478.

§ 24.100 Firearms violations

U.S. Supreme Court Exchange of gun for narcotics constituted "use" of firearm dur-

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ing drug trafficking. *Smith v. United States*, 113 S. Ct. 2050 (1993), 30 CLB 89.

Prior sentence did not have to be final in order to enhance sentence. *Deal v. United States*, 113 S. Ct. 1993 (1993), 30 CLB 88.

§ 24.135 Hobbs Act

Court of Appeals, 9th Cir. Legislative aide was public official for purpose of Hobbs Act. *United States v. Freeman*, 6 F.3d 586 (9th Cir. 1993), 30 CLB 183.

25. CAPACITY

§ 25.10 Insanity

U.S. Supreme Court Standard for competency to plead guilty was the same as that

for standing trial. *Godinez v. Moran*, 113 S. Ct. 2680 (1993), 30 CLB 89.

27. DEFENSES

§ 27.15 Entrapment

Court of Appeals, 9th Cir. Jury charge on entrapment required reversal. *United States v. Mkhsian*, 5 F.3d 1306 (1993), 30 CLB 276.

§ 27.45 Necessity

Court of Appeals, 9th Cir. Element of surrender to authorities was properly included within duress instruction. *United States v. Solano*, 10 F.3d 682 (1993), 30 CLB 277.

PART IV—FEDERAL PROCEDURE

29. PRELIMINARY PROCEEDINGS

§ 29.35 Other preliminary proceedings

U.S. Supreme Court Rule that probable cause determination has to be made within 48 hours of warrantless arrest was retroactively applicable. *Powell v. Nevada*, 114 S. Ct. 1280, 30 CLB 475.

31. PRETRIAL MOTIONS

§ 31.00 Sufficiency of indictment

§ 31.05 Procedure for dismissing indictment

Court of Appeals, 1st Cir. Trial court lacked authority to dismiss criminal charge based on government misconduct. *United States v. Santana*, 6 F.3d 1 (1st Cir. 1993), 30 CLB 180.

34. EVIDENCE

ADMISSIBILITY AND WITNESSES

§ 34.40 Character and reputation evidence

Court of Appeals, 4th Cir. Reversal required when highly prejudicial evidence was intro-

duced at trial. *United States v. Ham*, 998 F.2d 1247 (1993), 30 CLB 91.

§ 34.50 Proof of other bad acts

Court of Appeals, 4th Cir. Co-conspirator's testimony did not violate "prior bad acts" rule. *United States v. McMillon*, 14 F.3d 948 (1994), 30 CLB 384.

§ 34.165 Immunity of witness from prosecution

Court of Appeals, 4th Cir. Introduction into evidence of records allegedly protected by grant of immunity was harmless. *United States v. Sarin*, 10 F.3d 224 (1993), 30 CLB 278.

§ 34.220 Hearsay evidence

§ 34.225 —Admissions and confessions

Court of Appeals, 6th Cir. Admission of grand jury testimony of witness who died before trial was proper. *Curro v. United States*, 4 F.3d 437 (1993), 30 CLB 184.

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§ 34.230 —Business records exception

Court of Appeals, 9th Cir. Documents related to stolen automobiles were properly admitted as business record. *United States v. Childs*, 5 F.3d 1328 (1993), 30 CLB 280.

§ 34.235 —Declarations of Co-conspirators

Court of Appeals, 2d Cir. Admission of co-defendants' redacted statements was harmless error. *Ayala v. Leonardo*, 20 F.3d 83 (1994), 30 CLB 478.

Court of Appeals, 3d Cir. Evidence of co-conspirators' guilty plea was improperly admitted. *United States v. Thomas*, 998 F.2d 1202 (1993), 30 CLB 91.

Court of Appeals, 11th Cir. Admission of testimony of cellmate of nontestifying co-defendant was improper. *United States v. Veltmann*, 6 F.3d 1483 (1993), 30 CLB 184.

35. THE TRIAL

§ 35.50 Conduct of trial judge

U.S. Supreme Court Judge was not required to recuse himself based upon matters arising in a judicial proceeding unless the show of bias is pervasive. *Liteky v. United States*, 114 S. Ct. 1147 (1994), 30 CLB 475.

§ 35.60 —Prejudicial comments

Court of Appeals, D.C. Cir. Heated verbal exchanges between judge and defense counsel did not require reversal. *United States v. Logan*, 998 F.2d 1025 (1993), 30 CLB 91.

Judge's comment to jury that "verdict would not take too long" was not improper. *United States v. Spann*, 997 F.2d 1513 (1993), 30 CLB 90.

§ 35.100 Discretion to prosecute

§ 35.110 —Comments made during summation

Court of Appeals, 6th Cir. Mail fraud conviction was not subject to reversal even though prosecutor vouched for honesty of government witness. *United States v. Dandy*, 998 F.2d 1344 (1993), 30 CLB 92.

Court of Appeals, 9th Cir. Admission of statement by witness that a crime syndicate

controlled gambling operation in Hong Kong was harmless error. *United States v. Chu*, 5 F.3d 1244 (1993), 30 CLB 182.

36. THE JURY

SELECTION

§ 36.20 Exclusion of jurors in capital cases

Court of Appeals, 3d Cir. Jurors were properly excused due to bias against death penalty. *Deputy v. Taylor*, 19 F.3d 1485 (1994), 30 CLB 477.

§ 36.30 Peremptory challenges

Court of Appeals, 3d Cir. Prosecutor's peremptory challenge of jurors based upon their ability to speak and understand Spanish did not violate equal protection clause. *Pemberthy v. Beyer*, 19 F.3d 857 (1994), 30 CLB 476.

INSTRUCTIONS

§ 36.85 Duty to charge on defendant's theory of defense

Court of Appeals, 3d Cir. Refusal to give jury instructions as to the effect of a not guilty by reason of insanity verdict did not require reversal. *United States v. Fisher*, 10 F.3d 115 (1993), 30 CLB 278.

§ 36.95 Duty to charge on essential elements of crime

Court of Appeals, 2d Cir. Trial court's failure to instruct jury that Racketeer Influenced and Corrupt Organizations Act (RICO) predicate acts had to be interrelated was harmless error. *Ianniello v. United States*, 10 F.3d 59 (1993), 30 CLB 279.

Court of Appeals, 9th Cir. Failure to instruct jury that government had to prove overt act was harmless. *United States v. Taren Palma*, 997 F.2d 525 (1993), 30 CLB 90.

§ 36.110 Intent and willfulness

Court of Appeals, 5th Cir. Deliberate ignorance instruction was proper in a tax prosecution. *United States v. Wisenbaker*, 14 F.3d 1022 (1994), 30 CLB 384.

Giving of deliberate ignorance instruction was harmless error. *United States v. Cartwright*, 6 F.3d 294 (1993), 30 CLB 280.

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§ 36.165 Reasonable doubt

U.S. Supreme Court Instructions defining "reasonable doubt" did not violate due process. *Victor v. Nebraska*, 114 S. Ct. 1239 (1994), 30 CLB 476.

Deficient reasonable doubt instruction required reversal. *Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993), 30 CLB 90.

37. POSTTRIAL MOTIONS

§ 37.35 Federal habeas corpus

U.S. Supreme Court New jury instruction relating to murder convictions did not provide grounds for federal habeas relief. *Gilmore v. Taylor*, 113 S. Ct. 2112 (1993), 30 CLB 90.

§ 37.40 —Jurisdiction

U.S. Supreme Court Habeas corpus relief denied based on nonretroactivity principle. *Caspari v. Bohlen*, 114 S. Ct. 948 (1994), 30 CLB 381.

§ 37.60 —Burden of proof

Court of Appeals, 3d Cir. Instruction altering the burden of proof was in violation of due process. *Kontakis v. Beyer*, 19 F.3d 110 (1994), 30 CLB 479.

38. SENTENCING AND PUNISHMENT

SENTENCING

§ 38.30 Standards for imposing sentence

U.S. Supreme Court "Original sentence" was applicable guidelines sentence of imprisonment, not revoked term of probation. *United States v. Granderson*, 114 S. Ct. 1250 (1994), 30 CLB 475.

Jury instruction of future dangerousness was proper. *Johnson v. Texas*, 113 S. Ct. 2658 (1993), 30 CLB 89.

Court of Appeals, D.C. Cir. Sentencing judge may properly take into account defendant's decision to go to trial. *United States v. Jones*, 997 F.2d 1475 (1993), 30 CLB 94.

Court of Appeals, 2d Cir. Failure to take into account acceptance of responsibility for

probation did not violate equal protection. *United States v. Grasso*, 6 F.3d 87 (1993), 30 CLB 181.

Enhancement of sentence for obstruction of justice was mandatory. *United States v. Friedman*, 998 F.2d 53 (1993), 30 CLB 93.

Court of Appeals, 4th Cir. Sentence was properly enhanced for possession of a firearm, even though defendant was acquitted of firearms possession. *United States v. Nelson*, 6 F.3d 1049 (1993), 30 CLB 183.

Defendant's prior uncounseled misdemeanor conviction was properly used to enhance sentence on narcotics charges. *United States v. Falesbork*, 5 F.3d 715 (1993), 30 CLB 182.

Court of Appeals, 5th Cir. Upward adjustment of sentence for obstruction of justice was justified. *United States v. Graves*, 5 F.3d 1546 (1993), 30 CLB 180.

Restitution ordered for loss incurred by foreclosure of property was proper. *United States v. Reese*, 998 F.2d 1275 (1993), 30 CLB 92.

Court of Appeals, 6th Cir. Pistol discovered under defendant's cousin's seat in car was not a proper basis for enhancing defendant's sentence. *United States v. Cochran*, 14 F.3d 1128 (1994), 30 CLB 382.

Enhancement of sentence for abuse of position of trust was not proper. *United States v. Moored*, 997 F.2d 139 (1993), 30 CLB 93.

Court of Appeals, 7th Cir. Defendant in conspiracy case did not deserve to be sentenced for entire quantity of drugs involved. *United States v. DePriest*, 6 F.3d 1201 (1993), 30 CLB 183.

Defendant was subject to increased sentence for abuse of position of public trust. *United States v. Lamb*, 6 F.3d 415 (1993), 30 CLB 276.

Court of Appeals, 10th Cir. Federal criminal statute authorizing maximum prison term of twenty years for bank robbery was not ambiguous. *United States v. Wilson*, 10 F.3d 734 (1993), 30 CLB 276.

Use of alias by defendant was properly considered to be obstruction of justice after sentencing guidelines. *United States v.*

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Flores-Flores, 5 F.3d 1365 (1993), 30 CLB 275.

§ 38.35 Invalid conditions

Court of Appeals, 1st Cir. Government "loss" for sentencing purposes was not properly based on difference between bids on government contract. *United States v. Stern*, 13 F.3d 489 (1994), 30 CLB 384.

Court of Appeals, 11th Cir. District court had authority to order deportation of defendant as a condition of supervised release. *United States v. Chukwura*, 5 F.3d 1420 (1993), 30 CLB 183.

§ 38.40 Sentence not contemplated by plea

Court of Appeals, 11th Cir. Defendant's stipulated and unconvicted robberies were properly considered in determining sentence. *United States v. Moore*, 6 F.3d 715 (1993), 30 CLB 276.

§ 38.50 Resentencing

Court of Appeals, 1st Cir. District court lacked jurisdiction to "correct" sentence by increasing it more than seven days after sentence was originally imposed. *United States v. Fahm*, 13 F.3d 447 (1994), 30 CLB 383.

40. PROBATION AND PAROLE

§ 40.00 Conditions of probation

Court of Appeals, 1st Cir. Revocation of probation for violation of psychiatric treatment condition of probation was proper. *United States v. Gallo*, 20 F.3d 7 (1994), 30 CLB 477.

§ 40.25 Revocation of parole

Court of Appeals, 9th Cir. Rescinding of earlier commutation of sentence did not violate inmate's due process rights. *Kelch v. Director, Nevada Dep't of Prisons*, 10 F.3d 684 (1993), 30 CLB 277.

41. PRISONER PROCEEDINGS

§ 41.05 Cruel and unusual treatment

U.S. Supreme Court A prisoner claim for possible future harm to health was proper.

Helling v. McKinney, 113 S. Ct. 2475 (1993), 30 CLB 88.

Exhaustion of administrative remedy requirement was not satisfied by receipt of agency rejection of claim after commencement of suit. *McNeil v. United States*, 113 S. Ct. 1980 (1993), 30 CLB 88.

§ 41.35 Limitations on prison earnings

Court of Appeals, 9th Cir. Inmate had right to interest earned on funds in his personal bank account. *Tellis v. Godinez*, 5 F.3d 1314 (1993), 30 CLB 280.

§ 41.40 Access to legal assistance and courts

Court of Appeals, 3d Cir. Legal services provided to inmates in maximum security unit were constitutionally adequate. *Abdul-Akbar v. Watson*, 4 F.3d 195 (1993), 30 CLB 184.

§ 41.45 Other actions under Federal Civil Rights Act

U.S. Supreme Court Arrest without probable cause was not proper basis for civil rights action. *Albright v. Oliver*, 114 S. Ct. 807 (1994), 30 CLB 381.

§ 41.50 —Immunity

U.S. Supreme Court Appellate review of public official's qualified immunity for damages was proper where relevant legal authority not presented below was considered. *Elder v. Holloway*, 114 S. Ct. 1019 (1994), 30 CLB 382.

Prosecutors have only qualified immunity for administrative functions. *Buckley v. Fitzsimmons*, 113 S. Ct. 2606 (1993), 30 CLB 89.

Court of Appeals, 1st Cir. Parole officers were entitled to qualified immunity from claim that they exceeded scope of lawful protective sweep. *Crooker v. Metallo*, 2 F.3d 583 (1993), 30 CLB 181.

Court of Appeals, 8th Cir. District attorney had absolute immunity for presenting evidence in support of arrest warrant. *Kohl v. Casson*, 5 F.3d 1141 (1993), 30 CLB 182.

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§ 41.70 Transfer of prisoners

Court of Appeals, 6th Cir. Transfer of prisoner to higher custody classification at maximum level facility and confinement of inmate in protective custody violated his civil rights. *Howard v. Grinage*, 6 F.3d 410 (1993), 30 CLB 280.

42. ANCILLARY PROCEEDINGS

DEPRIVATION OF CIVIL RIGHTS

§ 42.30 In general

Court of Appeals, 1st Cir. Police official was not automatically entitled to immunity

in civil rights action. *Broderick v. Roache*, 996 F.2d 1294 (1993), 30 CLB 92.

FORFEITURE

§ 42.60 In general

U.S. Supreme Court Notice was required before seizing property subject to civil forfeiture. *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993), 30 CLB 275.

Court of Appeals, 3d Cir. Summary judgment was denied to the government in civil forfeiture case where property owner's affidavit raised genuine issues of fact. *United States v. Premises*, 14 F.3d 864 (3d Cir. 1994), 30 CLB 384.

PART V—CONSTITUTIONAL GUARANTEES

43. ADMISSIONS AND CONFESSIONS

GROUND FOR EXCLUSION; GENERALLY

§ 43.00 Involuntariness and coercion

§ 43.10— Promises of leniency

West Virginia Prosecution's use of defendant's confession at trial after prosecutor had offered leniency in exchange for the statement rendered defendant's conviction unconstitutional. *State ex rel. Justice v. Allen*, 432 S.E.2d 199 (1993), 30 CLB 284.

§ 43.40 Postindictment and postarrest statements

Court of Appeals, 2d Cir. Error in admitting postarrest statement in absence of counsel was harmless. *United States v. Beverly*, 5 F.3d 633 (1993), 30 CLB 181.

VIOLATIONS OF *MIRANDA* STANDARDS AS GROUNDS FOR EXCLUSION

§ 43.55 General construction and operation of *Miranda*

Court of Appeals, 6th Cir. Police officers' direction to defendant to point out location of narcotics amounted to interrogation. *United States v. Finch*, 998 F.2d 349 (1993), 30 CLB 93.

§ 43.60 Prerequisite of custodial interrogation

U.S. Supreme Court Officer's subjective view as to whether the person being interrogated is in custody was irrelevant for *Miranda* purposes. *Stansbury v. California*, 114 S. Ct. 1526 (1994), 30 CLB 475.

§ 43.90 Waiver of *Miranda* rights

§ 43.95 —Voluntary and intelligent requirement

Vermont The fact that the defendant's blood-alcohol level was more than twice the legal limit did not, in and of itself, demonstrate that his waiver of *Miranda* rights was invalid. *State v. Keith*, 628 A.2d 1247 (1993), 30 CLB 286.

§ 43.110 —Effect of *res gestae* and spontaneous statements

Court of Appeals, 5th Cir. Defendant's confession was voluntary despite his initial refusal to sign waiver form. *United States v. Bass*, 10 F.3d 256 (1993), 30 CLB 277.

44. CONFRONTATION OF WITNESSES

§ 44.00 In general

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§ 44.05 —Interpretations by state court

North Dakota Defendant's right to confrontation was violated by admission of hearsay testimony of child under age 10 without notice. *State v. Moriarty*, 501 N.W.2d 352 (1993), 30 CLB 186.

§ 44.15 Co-defendant's out-of-court statements

Court of Appeals, 7th Cir. Admission of co-defendant's extrajudicial statement implicating defendant did not violate confrontation clause. *United States v. Hamilton*, 19 F.3d 350 (1994), 30 CLB 478.

Massachusetts Admission of nontestifying co-defendant's exculpatory extrajudicial statements over defendant's objections was reversible error. *Commonwealth v. Adams*, 617 N.E.2d 694 (1993), 30 CLB 282.

§ 44.30 Opportunity to cross-examine

Court of Appeals, D.C. Cir. Error in precluding defendant from calling potential prosecution witness and from cross-examining investigator was harmless. *United States v. Shyllon*, 10 F.3d 1 (1993), 30 CLB 279.

§ 44.38 Videotaped testimony

New Mexico Defendant was not denied right to confront witnesses, where victims were allowed to testify by videotape. *State v. Fairweather*, 863 P.2d 1077 (1993), 30 CLB 387.

45. RIGHT TO COUNSEL

SCOPE AND EXTENT OF RIGHT GENERALLY

§ 45.25 Waiver

Maryland Before making a finding that defendant had waived right to counsel, the trial court was obligated to make inquiry as to the merits of defendant's reason for appearing without counsel. *Moore v. State*, 626 A.2d 968 (1993), 30 CLB 196.

§ 45.30 —Right to defend pro se

New York Trial court erred in excluding pro se defendant from sidebar conferences despite his request to attend. *People v. Rosen*, 597 N.Y.S.2d 914 (1993), 30 CLB 282.

ADEQUACY AND EFFECTIVENESS OF COUNSEL

§ 45.110 Ineffectiveness

Court of Appeals, 3d Cir. "Cause and prejudice" standard did not apply to ineffective assistance of counsel claim. *United States v. DeRewal*, 10 F.3d 100 (1993), 30 CLB 278.

§ 45.115 —Interpretations by state courts

California Defendant should be granted right to substitute counsel only when failure to do so would substantially impair defendant's right to adequate representation. *People v. Smith*, 863 P.2d 192 (1993), 30 CLB 386.

Colorado Counsel who was subject of post-conviction ineffective assistance of counsel claim could not be appointed as counsel for petitioner in post-conviction proceeding. *Murphy v. People*, 863 P.2d 301 (1993), 30 CLB 388.

§ 45.120 —Failure to assert available defense

Court of Appeals, 2d Cir. Failure of defense counsel to consult handwriting expert provided viable claim of ineffective assistance of counsel. *United States v. Tarricone*, 996 F.2d 1414 (1993), 30 CLB 92.

§ 45.125 —Incorrect legal advice

Court of Appeals, 5th Cir. Defendant was not denied effective assistance of counsel when defense counsel advised him to go to trial rather than plead guilty. *United States v. Faubion*, 19 F.3d 226 (1994), 30 CLB 479.

§ 45.130 —Failure to introduce evidence or make objections

Court of Appeals, 8th Cir. Defendant was not denied effective assistance of counsel for counsel's failure to investigate certain witnesses. *Battle v. Delo*, 19 F.3d 1547 (1994), 30 CLB 477.

CONFLICT OF INTEREST

§ 45.145 In general

Court of Appeals, 2d Cir. Allegations that defense lawyer participated in narcotics conspiracy created conflict of interest. *United*

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States v. Fulton, 5 F.3d 605 (1993), 30 CLB 181.

§ 45.160 Previous representation of prosecution witness

U.S. Supreme Court Pretrial counsel's representation of both the defendant and prosecution witness required a hearing as to possible conflict. *Burden v. Zant*, 114 S. Ct. 654 (1994), 30 CLB 381.

46. CRUEL AND UNUSUAL PUNISHMENT

§ 46.00 In general

U.S. Supreme Court Eighth Amendment applied to in rem civil forfeiture proceedings. *Austin v. United States*, 113 S. Ct. 2801 (1993), 30 CLB 87.

RICO forfeiture statute did not violate First Amendment. *Alexander v. United States*, 113 S. Ct. 2766 (1993), 30 CLB 87.

Court of Appeals, 9th Cir. Imposition of a fine on an indigent defendant was proper. *United States v. Favorito*, 5 F.3d 1338 (1993), 30 CLB 275.

§ 46.05 Death penalty

§ 46.11 —State constitutional requirements

Arizona Defendant's psychiatric condition required reduction of death sentences to life in prison. *State v. Stuard*, 863 P.2d 881 (1993), 30 CLB 387.

47. DOUBLE JEOPARDY

§ 47.00 In general

U.S. Supreme Court Sentencing phase of capital prosecution did not amount to "successive prosecution" for intentional murder in violation of double jeopardy clause. *Schiro v. Farley*, 114 S. Ct. 783 (1994), 30 CLB 382.

§ 47.05 —Interpretations by state courts

Iowa Child abuse charges did not merge into one, thus no former jeopardy violation. *State*

v. Spilger, 508 N.W.2d 650 (1993), 30 CLB 484.

§ 47.10 When jeopardy attaches

U.S. Supreme Court Double jeopardy clause applied to nonsummary criminal contempt proceedings. *United States v. Dixon*, 113 S. Ct. 2849 (1993), 30 CLB 87.

§ 47.20 Mistrials

Court of Appeals, 2d Cir. Posttrial discovery of government witnesses' perjury did not bar retrial. *United States v. Pavloyianis*, 996 F.2d 1467 (1993), 30 CLB 93.

§ 47.45 Separate and distinct offenses

Court of Appeals, 1st Cir. Prosecution for being a fugitive in possession of firearms was not barred by earlier conviction for failure to appear. *United States v. Colon-Osorio*, 10 F.3d 41 (1993), 30 CLB 279.

Court of Appeals, 7th Cir. Prosecution on drug conspiracy charges was not barred by double jeopardy where only two of twenty-three defendants named in indictment were also charged in prior indictment. *United States v. Dortch*, 5 F.3d 1056 (1993), 30 CLB 182.

48. DUE PROCESS

§ 48.00 In general

Court of Appeals, 1st Cir. District court's refusal to allow witness held in civil contempt to present testimony of witnesses in support of claim that he would never testify was not a denial of due process. In re Grand Jury Proceeding, 13 F.3d 459 (1994), 30 CLB 383.

Court of Appeals, 7th Cir. Defendant did not have a right to be present at pretrial hearing on scheduling. *Small v. Endicott*, 998 F.2d 411 (1993), 30 CLB 91.

51. FREEDOM OF THE PRESS

§ 51.00 In general

Court of Appeals, 3d Cir. Failure to give press posttrial access to proceedings relating

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to misconduct required reversal. *United States v. Simone*, 14 F.3d 833 (1994), 30 CLB 384.

53. FREEDOM OF SPEECH AND EXPRESSION

§ 53.00 In general

§ 53.05 —Speech

U.S. Supreme Court Enhancement of sentence because of defendant's selection of victim based on race was proper. *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993), 30 CLB 88.

54. IDENTIFICATION PROCEDURES

§ 54.10 Suggestiveness of identification procedure

New York A showup identification hours after the crime, with both complainant and defendant transported to the crime scene, was improper. *People v. Johnson*, 595 N.Y.S.2d 385 (1993), 30 CLB 95.

55. RIGHT TO JURY TRIAL

§ 55.00 In general

Court of Appeals, 8th Cir. Absence of African-Americans on jury did not violate defendant's Sixth Amendment rights. *United States v. Horne*, 4 F.3d 579 (1993), 30 CLB 185.

56. PROHIBITION AGAINST UNLAWFUL SEARCHES AND SEIZURES

SCOPE AND EXTENT OF RIGHT IN GENERAL

§ 58.03 Property subject to search

Court of Appeals, 1st Cir. Coast Guard search of vessel was illegal. *United States v. Cardona Sandoval*, 6 F.3d 15 (1993), 30 CLB 180.

§ 58.05 Constitutionally protected areas

Wisconsin Defendant had reasonable expectation of privacy in interior of truck, and

whether search of truck was unreasonable must be examined in this light. *State v. Dixon*, 501 N.W.2d 442 (1993), 30 CLB 188.

§ 58.10 Property subject to seizure

§ 58.30 —Automobile searches

Court of Appeals, 1st Cir. Officer's pursuit of motorcycle did not constitute "seizure" under Fourth Amendment. *Horta v. Sullivan*, 4 F.3d 2 (1993), 30 CLB 184.

Court of Appeals, 2d Cir. Stop of defendant for a traffic violation by police officer was proper even though the officer hoped to find further evidence of criminal activity. *United States v. Scopo*, 19 F.3d 777 (1991), 30 CLB 476.

Court of Appeals, 8th Cir. Police officers had probable cause to stop automobile exceeding speed limit. *United States v. Stapleton*, 10 F.3d 582 (1993), 30 CLB 277.

§ 58.70 Stop and frisk

U.S. Supreme Court Seizure of nonthreatening contraband detected during patdown search was proper. *Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993), 30 CLB 87.

BASIS FOR MAKING SEARCH AND/OR SEIZURE

§ 58.75 Search warrant

North Dakota Evidence of criminal activity found behind defendant's home was probable cause for issuance of search warrant. *State v. Erickson*, 496 N.W.2d 555 (1993), 30 CLB 185.

§ 58.80 —Sufficiency of underlying affidavit

Connecticut Defendant was not entitled to de novo review of a probable cause determination made by the judge issuing a search warrant. *State v. Diaz*, 628 A.2d 567 (1993), 30 CLB 194.

Louisiana Although affidavit itself, which failed to identify citizen informant was insufficient to establish probable cause for issuance of search warrant, seized evidence was not suppressed under the exclusionary rule. *State v. Barrilleaux*, 620 So. 2d 1317 (1993), 30 CLB 285.

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§ 58.105 Search incident to a valid arrest

§ 58.115 —Combined police information in determining probable cause

Court of Appeals, D.C. Cir. Lack of identification or business address was basis for probable cause. *United States v. Gibson*, 19 F.3d 1449 (1994), 30 CLB 477.

FRUITS OF THE POISONOUS TREE

§ 58.230 Evidence held admissible

§ 58.235 —Lack of "primary taint"

Court of Appeals, 7th Cir. Loss of evidence in drug raid did not justify exclusion of other evidence seized. *United States v. Kelly*, 14 F.3d 1169 (1994), 30 CLB 383.

59. PROHIBITION AGAINST SELF-INCRIMINATION

TESTIMONY AND RECORDS

§ 59.45 Duty to pay tax as self-incrimination

Nebraska Marijuana tax act was not in violation of Fifth Amendment. *State v. Garza*, 496 N.W.2d 448 (1993), 30 CLB 192.

60. RIGHT TO SPEEDY TRIAL

§ 60.15 Length of delay

§ 60.20 Reason for delay

§ 60.25 —Interpretations by state courts

Arkansas Twelve-month speedy trial period for remanded cases began on date mandate issued by Supreme Court, but certain periods were excluded from this time frame. *Clements v. State*, 851 S.W.2d 422 (1993), 30 CLB 191.

